78-875

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

BLAKE CONSTRUCTION CO., INC., *Petitioner,*

v.

ALLIANCE PLUMBING AND HEATING CO., INC.

and

BOHN HEAT TRANSFER DIVISION, GULF AND WESTERN MANUFACTURING COMPANY, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

DAVID J. TAYLOR
THEODORE A. MILES
Counsel for Petitioner

Of Counsel:

PEABODY, RIVLIN, LAMBERT & MEYERS
1150 Connecticut Avenue, N.W.
Twelfth Floor
Washington, D.C. 20036

November 30, 1978

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

Page

CASES:

Page

STATUTES:

MISCELLANEOUS:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

BLAKE CONSTRUCTION CO., INC., *Petitioner,*

v.

ALLIANCE PLUMBING AND HEATING CO., INC.

and

BOHN HEAT TRANSFER DIVISION, GULF AND WESTERN MANUFACTURING COMPANY, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

The petitioner, Blake Construction Co., Inc., respectfully prays that a writ of certiorari issue to review the Opinion and Order of the District of Columbia Court of Appeals entered in this proceeding on July 3, 1978.

OPINIONS BELOW

The Opinion and Order of July 3, 1978, of the District of Columbia Court of Appeals, is not yet reported; it is reprinted as Appendix A to this petition (App. A.). The Order appealed from, entered by the Superior

Court of the District of Columbia on April 6, 1978, is not reported; it is reprinted as Appendix B to this petition (App. B.). The Amended Order, entered by the Superior Court of the District of Columbia on April 25, 1977, is unreported; it is reprinted as Appendix C to this petition (App. C.).

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia was entered on July 3, 1978. A timely petition for rehearing or rehearing *en banc* was denied on September 1, 1978, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

May a subcontractor who has installed deficient air-handling equipment in an office building obtain a dismissal of the counterclaim for damages at the close of the prime contractor's case in chief and the first tier subcontractor's defense thereof on the grounds that the action is not being brought by the real party in interest because the building owner has paid the prime contractor for the construction?

May a trial judge condition the granting of leave to amend a counterclaim on the counterclaim plaintiff's agreement to waive its right to a trial by jury when the interests of justice clearly dictate that leave to amend be granted?

STATEMENT OF THE CASE

Blake Construction Company, Incorporated, a Delaware corporation, entered into a contract in September, 1968, with the BGW Limited Partnership (hereinafter

"BGW"), a partnership doing business in the District of Columbia, to erect a building at Vermont Avenue and K Street, N.W., Washington, D.C. Blake Construction Company, Incorporated was principally owned at the time by three individuals, Morton A. Bender, Stanley S. Bender and Howard M. Bender. Each of the three individuals was also a general partner in BGW.

In April, 1969, Blake Construction Company, Incorporated was merged into Blake Construction Co., Inc. (hereinafter "Blake"), a District of Columbia corporation principally owned by the same three individuals, and Blake assumed all rights and obligations with respect to the Vermont Avenue and K Street building.

The basic issue in the trial below involved the unauthorized installation of fans of the wrong size in the air handling units on floors two through ten of the building.[1] On April 14, 1969, Blake entered into a written contract with Alliance Plumbing and Heating Company, Inc., a Maryland corporation (hereinafter "Alliance") whereby Alliance became the mechanical subcontractor for the job and under which it agreed to provide all labor and materials to install the plumbing, heating, ventilating and air conditioning systems in the building.

Alliance in turn entered into a subcontract in June, 1969, with Bohn Aluminium and Brass Corp., Heat Transfer Division to provide air handling units for the building. Bohn was subsequently purchased by Gulf & Western Industries and became Bohn Heat Transfer Division, Gulf & Western Manufacturing Co. (hereinafter "Bohn").

---

[1] App. A at 2a.

On June 5, 1969, Alliance accepted the Bohn offer, and entered into a subcontract which provided that the equipment ". . . be in strict accordance with specifications, ammendments [sic] and contract drawings."[2]

Thereafter, Alliance submitted to Blake shop drawings (also known as "certified drawings") prepared by Bohn relative to the air handling components and their performance features. The shop drawings indicated that Bohn had obligated itself to install units composed of a fan section which would contain two fans, each fan wheel (blade) measuring 22¾" in diameter.[3]

The specifications attached to and made part of the Blake/Alliance contract provided that the units were to produce a total output of 18,675 cfm (cubic feet per minute) of air per floor by using a ten hp (horsepower) motor turning at not more than 800 rpm (revolutions per minute.)[4]

Fan diameter is a design feature which has a direct, proportional relationship to the amount of cfm which can be produced by an air handling unit. The "fan laws" govern this relationship and are scientifically precise.

The units were installed with nameplates indicating the diameters of the fans contained therein as 22¾". Following complaints from the building's tenants, however, and after intense efforts to isolate the problem, Blake discovered that the 18 fans as installed within

[2] Tr. at 98-99.

[3] App. E at 16a.

[4] App. E at 16a.

nine units on floors two through ten of the building were in fact 19½" in diameter[5] and tests revealed that less than 18,675 cfm was being generated by the units.[6] Bohn never revealed to Blake that it had provided 19½" fans instead of 22¾" fans and this fact was only discovered when, in desperation, the design engineer actually dismantled one of the typical air handling units.[7] Only when confronted with the fan diameter found by the engineer did Bohn's representative, who was present, reveal that Bohn had supplied smaller fans than specified in the drawings.

Blake then demanded that Alliance supply and install air handling units which conformed to the contract specifications and approved shop drawings, but Alliance refused to comply.

Blake withheld a small amount of money due under its contract with Alliance, and on December 28, 1973, Alliance filed suit against Blake claiming that final payment was due and owing to it for the balance of the contract price.[8] Blake answered and counterclaimed for breach of contract for the sum of $225,000 to replace the nonconforming air handling units that Alliance had supplied and installed.[9] Pursuant to an order of the court dated July 12, 1974, Alliance brought in Bohn as a third-party defendant on Blake's counterclaim.

[5] App. E at 17a.

[6] App. E at 17a.

[7] Tr. at 108-10.

[8] Complaint for Money Due Under Contract filed December 28, 1973.

[9] Answer to First Amended Complaint and Counterclaim by Blake Construction Co., Inc. filed February 6, 1974.

Between December 1974 and late March 1977, all parties diligently pursued discovery, filing numerous sets of interrogatories and deposing at least 14 witnesses. Extensive trial preparation culminated with the Pre-Trial Conference held February 23, 1977.

The trial of this matter commenced on March 25, 1977, three years and three months after the original complaint was filed. On the morning of the seventh day of trial, the trial judge called counsel into his chambers and *sua sponte* raised a procedural issue he thought it necessary to resolve before the case continued. The issue was whether counterclaimant Blake as general contractor for the building was the proper party to raise the claim against Alliance.

There followed an extensive colloquy on the record during which the question was referred to variously as one of "standing" (Tr. at 126, 129), "real parties in interest" (Tr. 134) and nonjoinder.[10] Counsel for Blake offered to bring the owners in, by amending the counterclaim. (Tr. at 134). The court indicated that it could either dismiss the case or declare a mistrial (with a new trial later on the amended complaint) (Tr. at 138), and was concerned that if the parties to be brought in insisted on a jury trial, the prior testimony (given in the trial then under way) would be unavailable. (Tr. 137.)

The court then directed counsel for Blake to find out if the owners would agree to waiver of a jury trial. (Tr. 143.) Counsel further assured the court that the

[10] THE COURT: Wait a moment, sir, I have problems with that. They would have to come in—they couldn't be the counter claim plaintiffs. They would have to assert a separate claim against Blake. And then, Blake would then assert the claim against Alliance. Which, in turn, would assert the claim against Bohn. (Tr. at 134).

owners and Blake would forego any potential double recovery. (Tr. at 144.) Thereafter the court denied Blake's motion to amend the counterclaim to bring in the owners, and dismissed the counterclaim, leaving the counterclaim plaintiff completely without relief. (Tr. at 145-47.)

The trial court's initial order dismissing the counterclaim (App. B) did not set forth specifically the basis for the dismissal; counsel for Blake requested clarification, which was still not provided in the Amended Order. (See App. C.)

On appeal to the District of Columbia Court of Appeals, petitioner challenged the denial of leave to amend the counterclaim to bring in the building owner and the court's conditioning of its decision on petitioner's refusal to waive its right to trial by jury.

The District of Columbia Court of Appeals held (thus clarifying the lower court's order), that the counterclaim had been dismissed for failure to join the real party in interest.[11]

The Court of Appeals Opinion then states that the trial court did not seek to coerce petitioner into waiving its right to jury trial, and that the trial court could make waiver of jury trial a condition of leave to amend the counterclaim. (App. A at 6.) The Court of Appeals then stated that because the trial court was justified in

[11] The Opinion states: "[s]ince no evidence was presented that *Blake* had suffered cognizable damages and since it was not the real party in interest, the counterclaim [was] dismissed." (App. A at 4; emphasis added.) (In view of the fact that there was extensive evidence of various elements of damages to the building owners arising from the breach, that ruling goes to *parties* rather than *substance*.)

denying leave to amend the counterclaim, it did not have to address the jury trial question.

Since, at a minimum, the Court of Appeals was saying that a trial court may give adverse weight, in exercising its discretion, to the assertion of the right to jury trial, Blake petitioned for rehearing so that the court might consider fully the implications of the statement in its opinion that a trial court "may . . . permit a party to amend his pleadings only on the condition that a timely demand for jury trial be stricken from the amended pleadings." [12] That petition was denied on September 1, 1978, and Blake now petitions this court to grant this petition to allow review of the actions set forth above.

REASONS FOR GRANTING THE WRIT

I. The Federal Rules of Civil Procedure (hereinafter "Federal Rules") were intended to prevent exactly the kind of unjust result obtained in this case, in which a claim for relief, otherwise proper, is lost because a party, who is available to the court, does not appear on the pleading which gives notice of the claim. The injustice is compounded because the prime contractor, which did plead the claim, *is*, under the rules, a real party in interest with standing to prosecute a claim against the subcontractor.

The Rules of Civil Procedure of the Superior Court of the District of Columbia (hereinafter Super. Ct. Civ. R.) have, in all material respects, wording which is identical to the Federal Rules, and they were adopted

[12] App. A at 6. The decision of the Court of Appeals, while disclaiming the constitutional question, operates in fact to uphold a limitation on the right to trial by jury.

by the Board of Judges of the Superior Court of the District of Columbia pursuant to an Act of Congress which provides that the Superior Court shall conduct its business according to the Federal Rules, unless it modifies those rules with the approval of the District of Columbia Court of Appeals.[13] The basic disregard for the philosophy of the Federal Rules embodied in the decision below should not become a precedent for the conduct of litigation in the District of Columbia, which is required by the statute to follow the Federal Rules of Civil Procedure.

II. The second reason for granting the petition is the lack of regard shown by the courts below for the constitutional right of trial by jury. The transcript of the proceedings before the trial judge reveals the importance he placed on that right being waived as a condition to amending the counterclaim to add the building owner. This Court has never held that a waiver of jury trial may be required as a condition of amending a pleading, or bringing in a party. On the contrary, this Court has always made itself available to assure that the right to a jury trial is not infringed. The right is invaded just as much by penalizing a party for invoking it as by coercing a waiver or entering a judgment which invades the jury's function. *If* trial courts are to be allowed to give adverse weight to the assertion of this basic right, it should only be in circumstances where the exercise of the right would create substantial injustice and there are no procedures available which would preserve the right. Neither of these circumstances is presented in this case, and it is important for this court to reaffirm the protected place of the jury by reversal of the decision below.

[13] Section 11-946, District of Columbia Code, P.L. 91-358, 84 Stat. 487.

I. The Court Should Not Have Dismissed the Action on the Ground That It Was Not Prosecuted by the Real Party in Interest

A. Blake was the real party in interest.

As is set forth in the Statement of the Case, Blake entered into a contract with BGW to construct an office building at Vermont Avenue and K Street, N.W., in the District of Columbia. Blake subcontracted with Alliance to provide and install the fan sections in the building's air handling system. The fan sections Alliance actually installed were inadequate and not in compliance with the building specifications incorporated into the contract. At the trial on Blake's counterclaim against Alliance for the above breach, the court dismissed the counterclaim on the ground that Blake was not the real party in interest on the counterclaim because it had been paid for construction of the building by BGW.

Rule 17(a) of the Civil Rules of the Supreme Court of the District of Columbia (hereinafter "D.C. Rule") provides that every action shall be prosecuted in the name of the real party in interest. The rule, read as a whole, has two aspects: Defendants should not be put to the expense and inconvenience of litigation by a party with no legal basis for bringing an action against them,[14] but on the other hand, in keeping with the overall liberality of the D.C. Rules, *if* a defendant has been put on notice of a claim against him, he should not be able to avoid liability because the action was brought on behalf of the wrong party.[15]

---

[14] Kenrich Corp. v. Miller, 256 F.Supp. 15 (D.Pa. 1966), *aff'd* 377 F.2d 312 (3d Cir. 1967).

[15] Strother v. District of Columbia, 372 A.2d 1291 (D.C. Ct. App. 1977).

The application of the rule in contract actions is complicated by the substantive law of third-party beneficiaries[16] and the growing trend to eliminate privity as a requirement for actions in warranty or contract against remote manufacturers, etc.[17] But this confusion does not cast doubt on Blake's status as a real party in interest. D.C. Rule 17(a) specifically provides that an action may be prosecuted by a party to the contract, even though it is expressly for the benefit of a third party.

In the instant case, Blake was the party which contracted with Alliance to have the air handling equipment installed. When the deficiences in the equipment were discovered, prior to Blake being paid by the owner, Blake filed this counterclaim against Alliance for the breach. At the time the counterclaim was filed, therefore, it is beyond dispute that Blake had both a legal and beneficial interest in the performance of the contract, and was a real party in interest. (Blake has never parted with any portion of its *legal* interest in the contract, by way of assignment or otherwise.)

Judge Braman recognized this in the colloquy at the trial, when he remarked that, in effect, the case would be the owner going against the prime contractor,

---

[16] Under earlier interpretations, a property owner was considered *not* to be a third-party beneficiary entitled to sue a subcontractor for breach. *See*, e.g. Joseph Lande & Son v. Wellsco Realty Co., 131 N.J.L. 191, 34 A.2d 418, 4 A. Corbin, Contracts, § 779D, 787 (1951).

[17] Kassab v. Central Soya Sales, Inc., 432 Pa. 217, 246 A.2d 848, 852 n.3 (1968); Picker X-Ray Corp. v. General Motors Corp., 185 A.2d 919 (D.C. Mun. App. 1962). The point is that it is not clear that the building owner had the right sought to be enforced against the subcontractor. Compare *McDaniel* v. *Durst Manufacturing Co., Inc.*, 184 F.Supp. 430 (D.D.C. 1960).

and he in turn against the subcontractor.[18] The judge's own construct of a series of claims following the claim of privity demonstrates the propriety of Blake being the counterclaim plaintiff against the subcontractor. Accordingly, then, the claim against Alliance was brought by the real party in interest as required by Rule 17, and the court erred in dismissing the action on the ground that it was not being prosecuted by the real party in interest.

B. Even assuming that Blake was no longer a real party in interest and that BGW was, the court did not provide a reasonable time to bring in the building owner.

D.C. Rule 17(a) provides that no action shall be dismissed on real party in interest grounds until a reasonable time has been allowed after objection for ratification, joinder or substitution of the party. In this case, counsel for Blake offered to bring in the building owner, with assurance against any double recovery against the subcontractor,[19] but the court denied Blake's motion to so amend the counterclaim, thus violating the above provision. The purpose of that provision is to avoid exactly what happened in this case—that a claim be defeated on a technicality which was readily correctable without prejudice to the defendants or undue disruption of judicial administration.[20]

The categorical wording of the provision can be read as placing on the courts a requirement that time

[18] Tr. p. 134.

[19] Tr. p. 144.

[20] Strother v. District of Columbia, fn. 15, supra, 1291-1298, n.17 (construing D.C. Rule 17(a)).

be allowed to bring in the real party in interest without exception.[21] Under that reading, even if the procedural vehicle for bringing in the party is an amendment of the counterclaim under Rule 15, which in general leaves amendments to the discretion of the trial court, the court is without power to deny leave to amend, at least if the only change wrought by the amendment is the adding of the real party in interest.[22]

C. Even if the granting of leave to amend was discretionary, the court abused its discretion in denying leave to amend under these circumstances.

The Court of Appeals held that the trial court was acting within the scope of his discretion, in denying the motion to amend. The holding is based on several factors, apart from the jury trial issue, which is treated separately below: First, "with new parties before the court, and the new issue of damages (*i.e.* whether the fact of payment of the prime contractor by the owner negates the contractors' claim for damages) it was necessary to end the existing trial." (App. A. at 5a). Second, the court referred to the added burden to appellees if the motion were granted, specifying the additional time for discovery, responding to the

[21] The Rule states "*No action* shall be dismissed . . . until a reasonable time has been allowed *after objection* for ratification of commencement of the action by, or joinder or substitution of the real party in interest . . . ." (emphasis added).

[22] *Compare* Pacific Gas & Electric Co. v. Fiberboard Products, Inc. 116 F.Supp. 377 (S.D.Cal. 1953). (Rule 21 on joinder governs Rule 15). But *see* International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America v. American Federation of Labor and Congress of Industrial Organizations, 32 F.R.D. 441 (D. Mich. 1963).

amended counterclaim, and subpoenaing and deposing additional witnesses. (App. A at 6a).

With respect to the first point, the court's assumption is in error, and accordingly is not a proper basis for the exercise of discretion.[23] The trial judge was not required to choose between dismissal and a mistrial. He had other options which would not have prejudiced any party.

Staying in the ambit of Rule 17, the owner could have ratified the complaint or been substituted for Blake as the real party in interest.[24] Any of these would have preserved the ongoing trial on the issue of breach and the amount of consequential damages.

The case in chief on the counterclaim had been presented. The first tier subcontractor had already put on rebuttal to the case in chief.[25] If there was any triable issue arising out of the relationship between Blake and BGW, it could have been severed from the issues of breach and damages for subsequent discovery and trial. The counterclaim defendants would not be prejudiced merely because they were required to defend.[26] Neither petitioner here, the counterclaim plaintiff, nor the owner of the building had diminished the counterclaim defendants' ability to defend either the original issues or any new issues which the additional party might

[23] Middle Atlantic Utilities Co. v. S.M.W. Development Corp., 392 F.2d 380 (2d Cir. 1968).

[24] *See generally* 3A Moore's Federal Practice, ¶ 17.15-1.

[25] App. A at 3a.

[26] *Compare* Barbarino v. Anchor Motor Freight, Inc., 421 F. Supp. 1003 (D. D.N.Y. 1976).

present.[27] Prejudice does not consist of having to defend, but of losing defenses.

The failure to name the building owner on the counterclaim was blown completely out of proportion by the lower courts. The merits of the counterclaim—the interpretation of the specifications, their application to the installed equipment, and the soundness of the various measures of damages claimed were not affected one iota by whether the claim was prosecuted by the owner or the prime contractor. The counterclaim defendants had been put on notice of the basis for the claim and the alternative theories of damages. Once assurance was made that there would be no double recovery, there was no possibility of undue prejudice to them. Under these circumstances, even if there is some authority under Rule 15 for a court to deny leave to amend to bring in a real party in interest, to do so in the instant case was an abuse of discretion. Leave to amend pleadings under Rule 15(a) should be granted when the interests of justice require.[28] In this case, denial of leave to amend, if upheld, will allow the counterclaim defendants, admittedly in breach of the contract requirements, to avoid a claim of which they have had full notice, leaving another to bear the loss. That result frustrates the basic intent of the Rules, and Rule 15 in particular to have cases disposed of on the merits.[29]

[27] Lomartira v. American Auto Ins. Co., 371 F.2d 550 (2d Cir. 1967).

[28] *E.g.*, Mercantile Trust Co. National Ass'n v. Inland Marine Products Corp., 542 F.2d 1010 (8th Cir. 1976).

[29] Foman v. Davis, 371 U.S. 178 (1962); Howey v. U.S., 481 F.2d 1187 (9th Cir. 1973).

II. The Trial Judge Violated a Fundamental Seventh Amendment Right in Seeking to Coerce Blake into Waiving a Jury Trial

As has been more fully set forth above, on April 4, 1977, the trial was interrupted as the court, *sua sponte,* raised a procedural defect it perceived in the action. After discussion with counsel, the court proposed the following choice to counsel for Blake:

THE COURT: Would Blake and the new claimant be willing to waive the jury trial?

MR. TAYLOR: I do not know the answer to that.

THE COURT: Would you please find out? That would be a material consideration. If it—if a jury trial would not be necessary, sir, it might be that much of the prior testimony would be readily admissable, by virtue of the testimony that's already been given. In point of fact, whether it's jury or non-jury, it seems to me that that will be the case, subject to the technical rule that if the witness is available, the witness should testify. But, I would think that—and, this has been a long, and it's been an arduous trial, and the parties have been subjected to a considerable amount of expense. *And, I would be inclined to consider that, persuasively, in exercising my discretion.*

On the other hand, if we could have an expeditious trial, then it would seem to me that I would give serious consideration to a mistrial route as distinguished from a dismissal route. (Tr. at 137-138. emphasis added.)

* * *

THE COURT: Well, we'll take a brief recess. Mr. Taylor, would you please call your principals *And, I'll ask you, please, so that there won't be any misunderstanding, if the response be that a new trial would be non-*

jury, that is, the parties would be agreeable to that, I would expect that to be binding upon the owner, as well as Blake. (Tr. at 140; emphasis added.)

The court in supposedly giving Blake a choice was really saying either you waive your right to a jury trial or your claim will be dismissed. This is so coercive as to offer no free choice at all; it was manifestly unjust and should not be countenanced by this Court.

The right to have a jury trial is a fundamental right in our legal system and is recognized as such in the Magna Charta, the Declaration of Independence, and the United States Constitution. U.S. CONST. Amend. VII. Rule 38(a) of both the Federal Rules of Civil Procedure and the Rules of Civil Procedure of the Superior Court of the District of Columbia also declare that the right to trial by jury as declared by the Seventh Amendment to the Constitution or by statute must be preserved to the parties inviolate. This Seventh Amendment right is such a fundamental part of the American legal system that any attempt to curtail it should be carefully considered. In *Dimick* v. *Schiedt,* 293 U.S. 474 (1935), Mr. Justice Sutherland said "Maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that *any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.*" (293 U.S. at 486; emphasis added.)

In *Daly* v. *Scala,* 39 A.2d 478 (1944), the Municipal Court of Appeals for the District of Columbia allowed defendants demand for jury trial even though defendant had failed to make that demand within the time specified by the court rule. The court stated:

> "The right to a jury trial is so jealously regarded by our courts that parties may not be deprived of it by a rigid construction of a procedural rule." *Daly* v. *Scala, supra,* at 479.

Despite the mandate to jealously guard this right, the District of Columbia Court of Appeals found it unnecessary in this case even to review the denial of this fundamental right, stating:

> "The fact that there was ample justification to refuse appellant permission to amend obviates the need to examine the question of a denial of the constitutional right to a jury." (App. A. at 6.)

While indicating in its Opinion that discretion to deny the request for leave to amend permitted the District of Columbia Court of Appeals to avoid consideration of the question of the jury trial issue, the court cited two cases, apparently in an effort to show that waiver of trial by jury can be used as a condition to amendment by a trial judge. Those two cases are either readily distinguishable or completely inapposite.

In *Parissi* v. *Foley,* 203 F.2d 454 (2d Cir. 1953), *rev'd on other grounds,* 349 U.S. 46 (1955), the trial court denied the right to file a jury demand for a counterclaim which was filed in the context of a trial which was resumed after an appeal in which sixteen days of testimony before the same judge sitting without a jury had already been conducted. In denying the petition for a writ of mandamus to compel the trial judge to grant the demand for a jury trial, the Court of Appeals held that the condition was not unreasonable. This is completely different from a situation in which a timely demand for a jury trial was made, a trial before a jury was in progress and then a trial judge sought a waiver

of the right to a jury trial in exchange for an opportunity to have the claim heard on the merits after a realignment of the parties.

In *Local 783, Allied Industrial Workers of America* v. *General Electric Company,* 471 F.2d 751 (6th Cir. 1973), the court held that the trial judge had *erred* in refusing to permit the amendment of the complaint and demand for jury trial filed only eight days before the trial was to begin. This would, of course, tend to support petitioners' claim that a demand for a jury should be honored, especially when timely made and when a judge seeks to take it away as a condition to other action. The *dictum* in the *Local 783* Opinion which relates to the discretion of the court to grant or deny jury trial clearly notes that conditioning amendment of a complaint on striking a jury demand must occur in "the proper circumstances" (i.e., when the amendment might otherwise, in the court's discretion, be denied), citing *Parissi* v. *Foley, supra.* In *Local 783* the court cited *Foman* v. *Davis,* one of the cases principally relied upon by Blake, as follows:

> Rule 15(a), however, provides that 'leave shall be freely given when justice so requires.' In the absence of any justifying reason, 'this mandate is to be heeded.' *Foman* v. *Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed 222 (1962). 471 F.2d at 755.

The court went on to say:

> In *Foman,* some factors which would justify a denial of a motion to amend were identified as undue delay, bad faith, undue prejudice to the opposing party, repeated failure to cure deficiencies by previous amendments, and futility of amendment. We find none of these or any other circumstances in this case which would have justified a refusal to permit the Union to amend its complaint. *Id.*

Precisely the same situation obtains in this case. While the District of Columbia Court of Appeals relies on *Local 783* as authority for its decision, that case was in fact precisely the contrary to this case and the only references by dictum to "proper circumstances" in which the waiver of a jury was appropriate was *Parissi* v. *Foley,* which presented, as noted before, a completely distinguishable situation. There the parties had proceeded without a jury and were trying to introduce a jury trial into the proceedings.

Indeed, the 6th Circuit in *Local 783 specifically stated:* "It becomes discretionary with the trial judge to grant a jury trial *only when the right has been waived by failure to make a demand.* (Id.; emphasis added.) Such discretion would not obtain in this case because no such failure to make a demand ever existed. The court went on to say "But even when exercising its discretion . . . 'the court should grant a jury trial in the absence of strong and compelling reasons to the contrary.' *Swofford* v. *B&W, Inc.,* 336 F.2d 406, 409 (5th Cir. 1964), *cert. denied,* 379 U.S. 962 (1965)." *Id.*

In *Local 783* the court looked at the various conditions for granting leave to amend, which have been treated, *infra,* and concluded:

> "[i]n the exercise of sound discretion, the granting of leave to amend can be conditioned in order to avoid prejudice to the opposing party." Strickler v. Pfister Associated Growers, Inc., 318 F.2d 788, 791 (6th Cir. 1963). A requirement that the amendment be filed by a specified date or than the party amending bear a portion of the additional cost to the opposing party would, in proper circumstances, be reasonable conditions. Firchau v. Diamond National Corp., 345 F.2d 269 (9th Circ. 1965).

471 F.2d at 756.

The court noted, however, with regard to the jury trial issue, and with particular reference to *Parissi:*

> The circumstances may even warrant, as was the case in Parissi v. Foley, 203 F.2d 454 (2d Cir. 1953), rev'd on other grounds, 349 U.S. 46 (1955), the condition that the case continue to be tried to the court even though the amendment raises issues triable to a jury. *But it is our opinion that the circumstances must indeed be exceptional before a party is required to forego his constitutional right to a trial by jury.* "The federal policy favoring jury trials is of historic and continuing strength." Simler v. Conner, 372 U.S. 221, 222, 83 S.Ct. 609, 610, 9 L.Ed 691 (1963), and any doubt should be resolved in favor of permitting a jury trial. Nice v. Chesapeake and Ohio Ry., 305 F.Supp. 1167, 1185 (W.D.Mich. 1969). *See* AMF Tuboscope, Inc. v. Cunningham, 352 F.2d 150 (10th Cir. 1965)

(Id.; emphasis added.)

CONCLUSION

For the reasons set forth above, we respectfully submit that this petition for certiorari be granted.

DAVID J. TAYLOR
THEODORE A. MILES
Counsel for Petitioner

Of Counsel:

PEABODY, RIVLIN, LAMBERT & MEYERS
1150 Connecticut Avenue, N.W.
Twelfth Floor
Washington, D.C. 20036

November 30, 1978

APPENDIX

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 12223

BLAKE CONSTRUCTION CO., INC., APPELLANT,

v.

ALLIANCE PLUMBING & HEATING CO., INC., ET AL.,
APPELLEES.

Appeal from the Superior Court of the
District of Columbia

(Hon. Leonard Braman, Trial Judge)

(Argued March 15, 1978 Decided July 3, 1978)

David J. Taylor for appellant.

Paul M. Rhodes for appellee Alliance Plumbing & Heating Co.

James J. Hickey, Jr., with whom *John J. Mullenholz* and *Donald W. Hamaker*, were on the brief, for appellee Bohn Heat Transfer Division.

Before KELLY and YEAGLEY, *Associate Judges*, and PAIR, *Associate Judge, Retired.*

KELLY, *Associate Judge*: Appellant Blake Construction Co., Inc. (Blake) entered into a contract in 1968 with BGW Limited Partnership (BGW) to construct a

building at Vermont Avenue and K Street, N.W., in this city.[1] The Blake Corporation was then principally owned by the same three individuals who are the general partners of BGW. On April 14, 1969, Blake contracted with Alliance Plumbing and Heating Co., Inc. (Alliance), as the mechanical subcontractor, to install the plumbing, heating, ventilating and air conditioning systems in the building. Alliance, in turn, entered into a contract with Bohn Aluminum and Brass Corp. (Bohn) to provide air handling units for the building.[2]

In performing its obligation under the subcontract, Bohn used fans within the air handling units which were smaller in diameter than those called for in the specifications, amendments and contract drawings.[3] Blake demanded that Alliance supply and install units which complied with the specifications and when Alliance failed to do so, withheld monies from the final contract payment pending Alliance's completion of its contractual obligation. On December 28, 1973, Alliance filed suit against Blake for monies claimed to be due and owing. Blake counterclaimed for breach of contract, seeking as damages the cost to replace the nonconforming air handling units. Alliance then brought in Bohn as a third-party defendant on the counterclaim.

---

[1] The contract was with Blake Construction Co., Inc., a Delaware Corporation, which later merged into Blake Construction Co., Inc., a District of Columbia Corporation.

[2] Bohn is now the Bohn Heat Transfer Division of Gulf Western Mfg. Co.

[3] Following complaints from the building's tenants, Blake discovered that 18 fans within 9 air handling units on floors two through ten were 19½ inches in diameter instead of 22¾ inches as called for in the specifications.

When trial commenced in March 1977, the court bifurcated the trial of the complaint and the counterclaim.[4] In the trial of the counterclaim, after Blake's case-in-chief and Alliance's defense were presented, Alliance and Bohn moved to dismiss the counterclaim for Blake's failure to prove that it had sustained any damages,[5] an issue raised by the court, sua sponte. Counsel for Blake moved for leave to amend the counterclaim to bring in the owners of BGW as the real parties in interest and to reopen its case in order that they could testify as to their damages. In considering this request, the following colloquy transpired:

> THE COURT: Would Blake and the new claimant be willing to waive the jury trial?
>
> COUNSEL: I do not know the answer to that.
>
> THE COURT: Would you please find out? That would be a material consideration. If it—if a jury trial would not be necessary, sir, it might be that much of the prior testimony would be readily admissible, by virtue of the testimony that's already been given. In point of fact, whether it's jury or non-jury, it seems to me that will be the case, subject to the technical rule that if the witness is available, the witness should testify. But, I would think that—and, this has been a long, and it's been an arduous trial, and the parties have been subjected to a considerable amount of expense. And, I would

---

[4] On the complaint, the jury returned a verdict for Alliance in the amount of $26,255.08.

[5] Counsel represented that sometime after appellant filed the counterclaim in this matter, Blake was paid in full by BGW. BGW never made claim on Blake for damages.

be inclined to consider that, persuasively, in exercising my discretion.

On the other hand, if we could have an expeditious trial, then it would seem to me that I would give serious consideration to a mistrial route as distinguished from a dismissal route.

After a short recess, counsel advised the court that Blake (or BGW) would not waive a trial by jury. The trial court then ruled that since no evidence was presented that Blake had suffered cognizable damage, and since it was not the real party in interest, the counterclaim would be dismissed. On appeal Blake assigns as error the trial court's refusal to allow leave to amend the counterclaim, and its consideration of Blake's unwillingness to waive jury trial as a factor in denying the motion to amend.

I

Blake first contends that the trial court erred in not allowing Blake to amend the counterclaim to bring the BGW partners before the court. Amendments to pleadings are controlled by Super. Ct. Civ. R. 15(a),[6] and the

[6] Super. Ct. Civ. R. 15(a) provides:

AMENDMENTS. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. If a pleading is dismissed or stricken with leave to amend, an amended pleading must be filed within 20 days unless

trial court has wide discretion to grant or refuse such amendments. *See, e.g., Autocomp, Inc. v. Publishing Computer Service, Inc.*, D.C.App., 331 A.2d 338 (1975); *Saddler v. Safeway Stores, Inc.*, D.C.App., 227 A.2d 394 (1967); *Capitol Car Sales, Ltd. v. Nellessen*, D.C.App., 217 A.2d 115 (1966); *Zackery v. Mutual Security Savings & Loan Ass'n*, D.C.App., 206 A.2d 580 (1965). Blake had initially alleged that it was damaged as a result of the expenditure of its funds and nonpayment by BGW. It is acknowledged, however, that sometime during the four-year three-month period between the time Blake first filed its counterclaim and the time the matter came to trial, Blake was paid in full by BGW.[7] Yet Blake at no time sought to amend its pleadings to bring the proper parties before the court. With new parties before the court, and the new issue of damages, it was necessary to end the existing trial. And, as the trial court pointed out, bringing in BGW as a counterclaim plaintiff would require the partners to assert a claim against Blake which Blake would assert against Alliance which Alliance would then assert against Bohn.

Leave to amend is not granted automatically under Super. Ct. Civ. R. 15(a) but only where justice so requires. *Order of Ahepa v. Travel Consultants, Inc.*, D.C. App., 367 A.2d 119, 124 (1976). As the Supreme Court stated in *Foman v. Davis*, 371 U.S. 178, 182 (1962),

otherwise provided by order of court. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

[7] Neither Alliance nor Bohn was apprised of BGW's payment.

a court may properly refuse to allow an amendment to a pleading where it is evident that the amendment would be accompanied by "undue delay, bad faith or dilatory motive on the part of the movant . . . [or] undue prejudice to the opposing party." We conclude that the trial court did not abuse its discretion in denying Blake's motion, given the amount of time in which the counterclaim could have been properly amended and the added burden to appellees if the motion were granted.[8]

II

Blake also argues that the trial court sought to coerce it into waiving a jury trial in the event of a retrial of this matter. The record does not reflect such coercion, however, for the court merely considered, in ruling on appellant's motion to amend, whether Blake would waive a trial by jury to facilitate retrial. In any event, a trial court may, within its discretion, permit a party to amend his pleadings only on the condition that a timely demand for jury trial be stricken from the amended pleadings. *See Local 738, Allied Industrial Workers, AFL-CIO v. General Electric Co.*, 471 F.2d 751, 755 (6th Cir. 1973); *Parissi v. Foley*, 203 F.2d 454, 455 (2d Cir. 1953), *rev'd on other grounds*, 349 U.S. 46 (1955). In the instant case, the court acted well within its discretion in denying appellant's request for leave to amend the counterclaim. Waiver of a jury demand was merely one factor which the trial court considered. The fact that there was ample justification to refuse appellant permission to amend obviates the need to examine the question of a denial of the constitutional right to a jury.

[8] Additional time would have been required for the filing of answers to the amended counterclaim, additional discovery would become necessary, and additional witnesses would have to be subpoenaed and deposed.

See Local 738, Allied Industrial Workers, AFL-CIO v. General Electric Co., supra at 755; *Parissi v. Foley, supra* at 455. If a new jury were to be impanelled for the purposes of retrial, it would have been necessary to retry before the new jury much of the evidence already heard by the trial judge. In the context of Super. Ct. Civ. R. 15(a), justice did not require such repetition and delay. *See Parissi v. Foley, supra* at 456.

The order on appeal is

Affirmed.

DISTRICT OF COLUMBIA
COURT OF APPEALS

[Filed Sep. 1, 1978, Alexander L. Sterns, Clerk]

CA 10968-73

No. 12223

BLAKE CONSTRUCTION CO., INC., *Appellant*,

v.

ALLIANCE PLUMBING & HEATING CO., INC., *et al.*, *Appellees*.

BEFORE: Newman, Chief Judge; * Kelly, Kern, Gallagher, Nebeker, * Yeagley, Harris, Mack and Ferren, Associate Judges; and * Pair, Associate Judge, Retired.

ORDER

On consideration of appellant's petition for rehearing or, alternatively, for rehearing *en banc*, and it appearing that no judge of this Court has called for a vote thereon, it is

ORDERED that the *en banc* petition is denied; and it is

FURTHER ORDERED by the merits division that the petition for rehearing is denied.

PER CURIAM

FOR THE COURT

/s/ THEODORE R. NEWMAN, JR.
Theodore R. Newman, Jr.

* Denotes Merits Division

Copies to:

Honorable Leonard Braman
Judge, Superior Court of the District of Columbia

Clerk, Superior Court of the District of Columbia

David J. Taylor, Esquire
1150 Connecticut Avenue, NW, Suite 1200
Washington, DC 20036

Paul M. Rhodes, Esquire
1100 17th Street, NW, Suite 606
Washington, DC 20036

John J. Mullenholz, Esquire
1700 K Street, NW, Suite 400
Washington, DC 20006

APPENDIX B

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

Civil Action No. 10968-73

Civil—I Judge Braman

ALLIANCE PLUMBING & HEATING CO., INC.,
Plaintiff and Third-Party Plaintiff,

vs.

BLAKE CONSTRUCTION CO., INC., *Defendant,*

vs.

BOHN HEAT TRANSFER DIVISION, GULF & WESTERN MANUFACTURING CO., *Third-Party Defendant.*

ORDER

Upon the motions of the Plaintiff, Alliance Plumbing & Heating Co., Inc. and the Third-Party Defendant, Bohn Heat Transfer Division, Gulf & Western Manufacturing Co., for a directed verdict dismissing the counterclaim of the Defendant, Blake Construction Co., Inc., it is hereby,

ORDERED that the counterclaim of Blake Construction Co., Inc. is dismissed. The Clerk is directed to enter judgment in favor of the Plaintiff, Alliance Plumbing & Heating Co., Inc. and the Third-Party Defendant, Bohn Heat Transfer Division, Gulf & Western Manufacturing Co. and against Blake Construction Co., Inc. with respect to the counterclaim of Blake Construction Co., Inc. Costs to be charged to the Defendant, Blake Construction Co., Inc.

/s/ LEONARD BRAMAN
Judge Leonard Braman

Dated: 4/6/17

Copies of signed order mailed to counsel 4/8/77

APPENDIX C

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

Civil Action No. 10968-73
Civil I—Judge Braman

ALLIANCE PLUMBING & HEATING CO., INC.,
Plaintiff and Third-Party Plaintiff,

v.

BLAKE CONSTRUCTION CO., INC., *Defendant,*

v.

BOHN HEAT TRANSFER DIVISION, GULF & WESTERN MANUFACTURING CO., *Third-Party Defendant.*

ORDER

The court having considered the letter of the counterclaim plaintiff's attorney dated April 12, 1977 (together with a proposed order) and the letter responses of the counterclaim defendant's attorney and the letter responses of the counterclaim defendant's attorney and the third-party defendant's attorney, dated April 13 and 14, respectively, and the court having considered its Order of April 6, 1977, it is this 22nd day of April, 1977,

ORDERED, that the Order of April 6, 1977 be, and the same is hereby, modified and amended as follows:

(A) In the second line of the "ORDERED" paragraph, strike the word "judgment" and insert in lieu thereof "judgments as follows: (1)";

(B) On the third, fourth and fifth lines of the "ORDERED" paragraph, strike the words "the Third-Party Defendant, Bohn Heat Transfer Division, Gulf & Western Manufacturing Co. and";

(C) On the sixth line of the "ORDERED" paragraph, after the words "Blake Construction Co., Inc.", insert

the following ", and (a) in favor of the Third-Party Defendant, Bohn Heat Transfer Division, Gulf & Western Manufacturing Co. and against Alliance Plumbing & Heating Co., Inc. on its Third Party Complaint."; and it is further,

ORDERED, that the Order of April 6, 1977, as thus amended and modified, is to read as follows:

"Upon the motions of the Plaintiff, Alliance Plumbing & Heating Co., Inc. and the Third-Party Defendant, Bohn Heat Transfer Division, Gulf & Western Manufacturing Co., to dismiss the counterclaim of the Defendant, Blake Construction Co., Inc., it is hereby,

ORDERED, that the counterclaim of Blake Construction Co., Inc. is dismissed. The Clerk is directed to enter judgments as follows: (1) in favor of the Plaintiff, Alliance Plumbing & Heating Co., Inc. against Blake Construction Co., Inc. with respect to the counterclaim of Blake Construction Co., Inc., and (2) in favor of the the Third-Party Defendant, Bohn Heat Transfer Division, Gulf & Western Manufacturing Co. and against Alliance Plumbing & Heating Co., Inc. on its Third-Party Complaint. Costs to be charged to the Defendant, Blake Construction Co., Inc."

/s/ LEONARD BRAMAN
JUDGE

Copies to:

Paul M. Rhodes, Esquire
1100 - 17th Street, N.W.
Washington, D.C. 20036

David J. Taylor, Esquire
1150 Connecticut Ave., N.W.
Washington, D.C. 20036

John J. Mullenholz, Esquire
888 - 17th Street, N.W.
Washington, D.C. 20006

APPENDIX D

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA,
CIVIL DIVISION, NO. 10968-3

ALLIANCE PLUMBING, HEATING CO., INC., *Plaintiff*,

v.

BLAKE CONSTRUCTION CO., INC., et al., *Defendants*.

EXCERPTS FROM TRANSCRIPT OF TESTIMONY AND PROCEEDINGS CITED IN PETITION FOR CERTIORARI

[Transcript Page 126]

THE COURT: Pursuant to the request of the Court, on Friday, at the conclusion of the trial date, counsel met with the Court in chambers this morning at 9:00. At that time, the Court mentioned to counsel, principally to Mr. Taylor, two problems that the Court had with Blake's case.

. . . .

The first and more eminent problem had to do with the standing of Blake.

[Transcript Page 129]
Mr. Rhodes . . . .

This separateness of their identities, which they have clearly preserved, I think further points at the fact of Blake's lack of standing as a prime contractor to claim or recover damages which may have been sustained by the owner in the construction of the building.

[Transcript Page 134]
Mr. Taylor

[T]his issue was raised for the first time, sua sponte, by the Court, this morning. I would not argue that standing cannot be raised, at any time. I agree that it can. But, I offered to have the true party in interest come before the Court—if the Court is disposed to dismiss the case on the

ground of standing. I would move for leave to amend the complaint to bring in the true parties in interest. If necessary, to reopen the plaintiff's case, in order to let them testify as to the relationship and the damage, to submit them to cross examination by the defendants. And, in that manner, to avoid what seems to me would be a manifest injustice.

THE COURT: Well, Mr. Taylor, I think there is some degree of persuasiveness to your position, that is, on bringing in the real parties in interest. And, it may be, although we're talking about standing, maybe this is a problem of the real parties in interest. . . .

They couldn't be the counter claim plaintiffs. They would have to assert a separate claim against Blake. And then, Blake would then assert the claim against Alliance.

[Transcript Page 137-38]

THE COURT: Would Blake and the new claimant be willing to waive the jury trial? . . . .

That would be a material consideration. If it—if a jury trial would not be necessary, sir, it might be that much of the prior testimony would be readily admissable . . . .

On the other hand, if we could have an expeditious trial, then it would seem to me that I would give serious consideration to a mistrial route as distinguished from a dismissal route.

[Transcript Page 140:]

THE COURTS . . . . Mr. Taylor, would you please call your principals? And, I'll ask you . . . if the response be that a new trial would be non-jury, that is, the parties would be agreeable to that, I would expect that to be binding upon the owner, as well as Blake.

[Transcript Page 143:]
Mr. Taylor:

The owners do not see any reason given that position to waive trial by jury.

[Transcript Page 144]

MR. TAYLOR: Yes, Your Honor, I feel quite sure that I could get a waiver of rights with respect to the owner if the issue is double recovery.

[Transcript Page 145]

[T]he Court being of the view that the counterclaim plaintiff, having suffered no congnizable [sic] damage, is not the proper party, is not the real party in interest, Court will order the counterclaim dismissed.

[Transcript Page 146-47]

THE COURT: Ladies and gentlemen . . . . the counterclaim is being dismissed by the Court . . . .

It's a fundamental principle of law, ladies and gentlemen, that the person who brings a claim, who sues in court, must be damaged.

Now, if anybody has been injured in this case, it's the owner of the building; the owner has suffered damage . . . . there has been no showing in the record that Blake has suffered a dollar's worth of damage. The persons entitled to bring the claim are the owners. Therefore, ladies and gentlemen, the Court, after hearing counsel, has decided that the counterclaim should be dismissed.

APPENDIX E

ALLIANCE PLUMBING, HEATING CO., INC., *Plaintiff*,

vs.

BLAKE CONSTRUCTION COMPANY, INCORPORATED, et al., *Defendant*

EXCERPTS FROM PRE-TRIAL PROCEEDINGS

Calendar No. 8750-J

Civil Action No. 10968-73

Civil I—Judge Braman

Nature of Proceedings and Undisputed Facts:

This is an action for balance due under a construction contract, the defendant filing a counterclaim and the plaintiff-counterclaim defendant having filed a third party complaint.

• • •

The specifications to the Blake/Alliance contract provided that the units were to produce a total output of 18,675 CFM (cubic feet per minute) of air per floor by using a ten hp (horsepower) motor turning at not more than 800 RPM (revolutions per minute) to overcome external static pressure of one-half inch.

• • •

Pursuant to its contract, Bohn submitted shop drawings which specified that it would use 22¾ inch diameter fans (two fans per unit). A blank space was left for the designation of the discharge arrangement for the fan sections. Alliance passed the shop drawings on to Blake who in turn stamped the drawings approved (with the blank space still left open) and proceeded to pass said shop drawings to its mechanical engineer, Sheffermann and Biegelson Company, who stamped the drawings approved while still leaving the blank space for discharge arrangement open. The shop

drawings were then returned to Alliance where there was inserted into the blank space the figure "4", signifying a horizontal discharge arrangement. A Bohn representative (Kimmel) was present at the time. There is no agreement as to whether the blank was filled in by the Bohn representative or Alliance representative. The shop drawings noted, "sizes 20 thru 24 arr. 1 or 2", signifying that VCS-22 (the 22¾ inch diameter fan) was not available in the number 4 or horizontal arrangement. Alliance did not pick up the foregoing notation.

The shop drawings were then referred back to Bohn who, instead of furnishing 22¾ inch fans (VCS-22), furnished 19½ inch diameter blades (VCS-18), which latter fans were available in the horizontal arrangement. Bohn delivered the air handling units (including the fans) with a plate on the outside of the housing signifying "VCS-22S". (It is agreed that the units delivered had a VCS-22 coil section and a VCS-18 fan section.) Prior to said delivery, Bohn sent and Alliance received acknowledgement forms signifying that VCS-18 fan sections would be used. (Bohn also sent out acknowledgement forms specifying that VCS-22 fan sections would be used. Bohn and Alliance agree that the VCS-18 acknowledgement forms were subsequent to the VCS-22 forms.) After the units were delivered, Bohn transmitted invoices to Alliance referring to VCS-18 fan sections.

Blake was not advised as respects the change in the fan sections, nor was the mechanical engineer.

• • •

The eighteen fans actually installed within nine units in floors two through ten of the building were in fact 19½ inch in diameter. Measurements conducted relative to the total CFM output also revealed that less than 18,675 CFM was being generated. (The parties do not agree as to the cause of this CFM output.)

A VCS-18 fan section contains 2 fans, each 19½ inches in diameter. The VCS-22 fan section contains 2 fans each 22¾ inches in diameter.

• • •

Dated: February 23, 1977

/s/ LEONARD BRAMAN
Leonard Braman
Pretrial Judge